No. 47900-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

SCHNITZER WEST, LLC, a Washington limited liability company,

Respondent,

v.

CITY OF PUYALLUP, a Washington municipal corporation,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Superior Court's subject matter jurisdiction under the Land Use Petition Act, Chapter 36.70C RCW, is strictly limited to reviewing a municipality's "land use decision". This term is unambiguously defined as a local government's "*final determination*" on an "*application* for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred or used". RCW 36.70C.020(2)(a) (emphasis added). Expressly excluded from LUPA jurisdiction are the legislative enactments of city and county councils, as well as any decisions that are appealable to the Growth Management Hearings Board.

The local enactment challenged in this proceeding, City of Puyallup Ordinance No. 3067, is not a "land use decision" under this well-established standard. The sole purpose of the ordinance was to adopt various amendments to the Puyallup Municipal Code regarding the text and applicability of the City's overlay zoning district regulations. These code amendments were self-initiated by the Puyallup City Council and thus do not—and could not—represent a "final determination" on any "application" for a project permit within the meaning of RCW

36.70C.020(2)(a). Indeed, it is undisputed that no such application exists anywhere in the record for this appeal.

The challenged amendments were also processed and adopted by the City *legislatively*, and by their plain terms are intended to uniformly govern development upon all present and future properties located within the designated overlay area. Ordinance No. 3067 does not change the underlying zoning classification of any parcel and is wholly unassociated with any particular development proposal. By its plain terms and effect, the ordinance contains local development regulations that fall within the exclusive review authority of the Growth Management Hearings Board. LUPA jurisdiction does not lie under these circumstances.

As a matter of law, this case should have been dismissed below on these jurisdictional grounds. In erroneously characterizing the Puyallup City Council's enactment of Ordinance No. 3067 as a "site-specific rezone" and a "land use decision", the Superior Court disregarded the unambiguous state law definitions of those terms and departed sharply from a lengthy body of judicial and Growth Board precedent. The Court of Appeals should correct this error, reverse the trial court's ruling, and dismiss Respondent Schnitzer West's LUPA appeal.

II. STATEMENT OF THE CASE

2.1. Legislative History and Adoption of Ordinance No. 3067.

The Shaw/East Pioneer area of Puyallup is located in the City's northeast corner and is widely considered a symbolic "gateway" to the City. *CP 205, 211.* In 2009 the City adopted Chapter 20.46 of the Puyallup Municipal Code (PMC), which created a framework of alternate, use-specific "overlay" zones for the Shaw Road/East Pioneer area. *See* Chapter 20.46 PMC *(CP 268-71).*[1] The purpose of the Shaw/East Pioneer (SPO) overlay zones is to "establish[] standards to supplement base zoning standards in this area, either on an area-wide basis or in conjunction with an underlying zone district." PMC 20.46.005 *(CP 268).* Chapter 20.46 PMC imposes various regulations that are intended to promote creative, flexible and quality development; to ensure safe and pedestrian-oriented streetscapes; and to encourage the use of low-impact development

[1] Overlay zoning designations are a common means by which local jurisdictions may "augment their general zoning classifications with more detailed, property-specific" regulations. WASHINGTON REAL PROPERTY DESKBOOK SERIES: Vol. 5 Land Use Planning (Wash. St. Bar Assoc. 4th ed. 2012), §8.4(2). Overlay designations may "impose density or use limitations that are more or less restrictive than otherwise allowed within the applicable zone to account for unique infrastructure concerns or plan-related goals." *Id.* In addition to the SPO regulations codified at Chapter 20.46 PMC, Puyallup has adopted several other overlay designations that are specific to particular land use categories and/or areas of the City. These include overlays for parking (Chapter 20.47 PMC), floodplains (Chapter 20.49 PMC), agricultural uses (Chapter 20.50), and architecturally or historically significant buildings (Chapters 20.51 and 20.52 PMC).

methods within the SPO overlay. *See* PMC 20.46.005-.015 *(CP 268-69).* The underlying zoning classification of parcels located within the overlay is unchanged by Chapter 20.46 PMC.

Respondent Schnitzer West, LLC ("Schnitzer") is the contract purchaser of land located north of East Pioneer Avenue and commonly known as the Van Lierop property. *CP 3.* Although the Van Lierop property was situated outside the Puyallup City limits when the SPO overlay zones were first adopted in 2009, Chapter 20.46 PMC included an express statement of the City's intent to extend the SPO overlay zone to that area when it was ultimately annexed. *CP 207.* Annexation of the Van Lierop property occurred in 2012, *CP 117,* and the area was reclassified as "Limited Manufacturing" (ML) on the City's official zoning map the following year. *CP 317-21.*

Following a contentious policy debate regarding the appropriate development standards for the newly annexed property, in January 2014 the Puyallup City Council imposed a temporary moratorium on development approvals within the SPO area. *CP 106, CP 118, CP 323-27.* The same month, the City Council—on its own initiative—directed the City's Planning Commission and staff to analyze the potential expansion of the SPO overlay to the area north of East Pioneer Avenue. *CP 112-13,*

CP 205. Following the Planning Commission's review, the City Council ultimately proceeded with this expansion by adopting Ordinance No. 3067—the action challenged by Schnitzer in the instant appeal—on May 28, 2014. *CP 205-11*. At no time did Schnitzer (or any other private party or landowner) apply for or otherwise request this expansion of the SPO overlay; rather, it came about solely at the suggestion of the Puyallup City Council acting in its legislative (i.e., policy-making) capacity.

Ordinance No. 3067 added a new overlay zone for "limited manufacturing" (ML-SPO) uses to the SPO framework under Chapter 20.46 PMC. The scope of the SPO overlay under Puyallup's official zoning map was also expanded to encompass the portion of the recently annexed area located north of East Pioneer Avenue that was already zoned Limited Manufacturing, including the Van Lierop property. *CP 205-11*. The remainder, and majority, of Ordinance No. 3067 contained amendments to the text of Chapter 20.46 PMC establishing development regulations for the new ML-SPO overlay zone. *Id.* These included regulations pertaining to outdoor storage uses; standards governing the design, size, setback and orientation of buildings; landscaping, open space and pedestrian infrastructure requirements; signage provisions; and stormwater management regulations. *CP 207-09*. These regulatory

standards apply generally to all property within the ML-SPO overlay zone. *Id.* Nothing in the ordinance refers to, or purports to render a determination on, any particular site-specific land use development application. *CP 205-11.* Indeed, no project-specific or site-specific land use development applications were pending for any of the properties within the ML-SPO overlay zone at the time the legislative proves for Ordinance No. 3067 was initiated.

The City's purpose for creating the ML-SPO overlay, together with the new development regulations for properties covered by this designation, was to ensure that future development within the symbolically and aesthetically significant Shaw-East Pioneer area would be consistent with Puyallup's community vision. As noted *supra*, the City had long anticipated expansion of the SPO overlay zone to encompass the Van Lierop property when the area was ultimately annexed. *CP 207.* However, in light of the recent redesignation of the Van Lierop property as ML, the City's planners disfavored simply applying the original SPO regulatory framework to this area. As City staff explained, this approach was undesirable from a community planning standpoint "given that the current SPO is crafted to address commercial projects which are generally different from the larger-scale industrial uses

and related site features typically accommodated in the ML zone." *CP 126.* As an alternative approach, City staff suggested that the SPO overlay could, as planned, be applied to the ML-zoned properties, but with use-specific revisions to the development standards codified within the overlay framework. *CP 126.* The latter option—i.e., extending the SPO overlay to the subject parcels, but with a new sub-designation (ML-SPO) and supplemental regulations appropriate for larger-scale industrial uses—was the policy approach ultimately selected by the Puyallup City Council. *CP 205-11.*

Because the proposed changes were legislatively initiated by the City of Puyallup itself, Puyallup did not utilize the City's procedural framework for project-specific land use development applications in processing and adopting Ordinance No. 3067. Instead, the City consistently followed its standard legislative procedures for amending the City's development regulations as prescribed by the Washington Growth Management Act (GMA). Pursuant to these requirements, the proposed amendments were vetted by the City's Planning Commission, subjected to a legislative public hearing, and were ultimately codified as part of the land use regulatory framework set forth in the Puyallup Municipal Code. *CP 115-211. See* PMC 20.10.020.

2.2. Development Application for Van Lierop Property.

Schnitzer filed a short plat application in February 2014, seeking to subdivide and develop the Van Lierop property. *CP 9.* Schnitzer's application was filed four months before the June 4, 2014 effective date of Ordinance No. 3067, and the ordinance does not reference this application in any manner. *CP 205-11.* The City has never expressed its intent to apply the regulations contained in Ordinance No. 3067 to Schnitzer's development of the Van Lierop property under the pending short plat application. To the contrary, because the application vested to the local regulatory framework in place at the time the application was submitted, *see* RCW 58.17.033, the City has publically disclaimed any intent to do so. *CP 284;RP (April 16, 2015) 8-9.*

2.3. Schnitzer's LUPA Appeal and Growth Management Hearings Board Petition.

Schnitzer initiated the above-captioned action by filing and serving its original Land Use Petition and Complaint on June 17, 2014, seeking a declaratory judgment invalidating Ordinance No. 3067 and asserting a monetary damages claim for tortuous interference. *CP 1-23.* Schnitzer subsequently filed an Amended Land Use Petition and Complaint on July 9, 2014, which removed the previous damage claim. *CP 24-44.* Shortly thereafter, Schnitzer also filed a Petition for Review with the Central

Puget Sound Growth Management Hearings Board challenging the ordinance in that forum. *See Schnitzer West v. City of Puyallup*, CPGMHB Case No. 14-3-0008, Petition for Review.[2]

After denying the City's motion to dismiss the appeal on jurisdictional grounds, *CP 422-25,* the Honorable Elizabeth P. Martin of the Pierce County Superior Court held oral argument on the merits of Schnitzer's Land Use Petition on May 27, 2015. *CP 699.* Judge Martin subsequently issued a letter ruling on June 18, 2015 invalidating Ordinance No. 3067 on procedural and Appearance of Fairness grounds, as well determining that the enactment constituted, in her words, a "discriminatory spot zone". *CP 676-80.* The Superior Court entered a final order to this effect on August 7, 2015. *CP 699-04.* The City timely appealed to this Court by filing a Notice of Appeal on August 12, 2015. *CP 709-35.*

III. ASSIGNMENTS OF ERROR

The City assigns error to the Superior Court's refusal to dismiss Schnitzer's Land Use Petition on jurisdictional grounds and the court's determination that LUPA jurisdiction applies to the Puyallup City

[2] The GMHB appeal has been stayed by stipulation of the parties during the pendency of the above-captioned matter. *See Schnitzer West v. City of Puyallup*, CPSGMHB Case No. 14-3-008, Order Granting Fifth Settlement Extension and Amending Schedule (October 19, 2015).

Council's adoption of Ordinance No. 3067. Without limitation of the foregoing, the City specifically assigns error to these determinations of the Superior Court as set forth in the court's April 16, 2015 Order Denying the City's Motion to Dismiss, the court's June 18, 2015 letter ruling, and the court's August 7, 2015 LUPA Decision and Judgment. The City likewise assigns error to the Superior Court's determination that Ordinance No. 3067 was an unlawful spot-zone, and its conclusion that the City's enactment of that ordinance was subject to—and violated—the Appearance of Fairness doctrine.

With respect to the merits of Schnitzer's challenge to Ordinance No. 3067, the Court of Appeals confines its review to that enactment and does not consider the Superior Court's decision. *See, e.g., Rosema v. City of Seattle*, 166 Wn. App. 293, 297, 269 P.3d 393 (2012). The City does not assign error to the content of Ordinance No. 3067 or to the procedures by which the enactment was ultimately adopted.

IV. ARGUMENT AND LEGAL AUTHORITY

4.1. Summary of Argument.

Washington law establishes a clear divide regarding the appellate venue for challenging local land use and zoning actions. Where—and only where—a municipality has entered a final determination on a site-

specific development application filed by a project applicant, the appropriate review authority is the Superior Court under the Land Use Petition Act. By the plain language of Chapter 36.70C RCW, there can be no "land use decision"—and thus, no LUPA jurisdiction—without a specific project permit application of this type. Conversely, a municipality's amendment of its codified development regulations and other local legislative enactments are exclusively appealable to the Growth Management Hearings Board.

City of Puyallup Ordinance No. 3067 is comprised overwhelmingly of amendments to the text of the City's codified development regulations and was not adopted in response to any party's "application". Instead, the Puyallup City Council's enactment of this measure was self-initiated and followed the City's standard legislative process for amending its municipal code. By both the content and surrounding context of this enactment, Ordinance No. 3067 is not a "land use decision" subject to LUPA. The Court accordingly lacks jurisdiction over the ordinance, the proper appellate venue for which is the GMHB.

Schnitzer's contrary arguments are without merit. The company simply ignores LUPA's unambiguous "application" criterion, and it is unable to cite any reported Washington case law in which LUPA

jurisdiction has been applied to a local legislative enactment which, like Ordinance No. 3067, did not result from a specific party's request. No such authority exists. Contrary to Schnitzer's assertions, the City correctly processed Ordinance No. 3067 as a legislative code amendment, and the resulting regulations do not constitute "spot zoning" under relevant case law standards. The Court of Appeals should reject Schnitzer's arguments, reverse the trial court's erroneous rulings below, and dismiss Schnitzer's LUPA appeal.

4.2. Standard of Review and Burden of Proof.

4.2.1. Review of the Court's subject matter jurisdiction is *de novo.*

The dispositive issue in this appeal concerns the Court's subject matter jurisdiction under LUPA to review the City's adoption of Ordinance No. 3067. "Whether a court has subject matter jurisdiction is a question of law reviewed *de novo*." *Dougherty v. Dept. of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003).

4.2.2. Review under LUPA is deferential.

For the reasons set forth *infra*, the instant case does not involve a "land use decision" appealable under Chapter 36.70C RCW, and as such the LUPA standards of review are inapplicable here. Notwithstanding, judicial review in a LUPA appeal is confined to the record created during

the administrative proceedings below. RCW 36.70C.120(1); *CROP v. Chelan County*, 105 Wn. App. 753, 758, 21 P.3d 304 (2001). The Court of Appeals limits its review to the underlying local action without reference to the Superior Court's decision. *Rosema*, 166 Wn. App. at 297. Any findings or conclusions entered by the lower court are considered surplusage and are disregarded on appeal. *See, e.g., Wellington River Hollow, LLC v. King County,* 121 Wn. App. 224, 230 n.3, 54 P.3d 213 (2002); *Grader v. City of Lynwood,* 45 Wn. App. 876, 879, 728 P.2d 1057 (1986).

"Under LUPA, a court may grant relief from a local land use decision only if the party seeking relief has carried the burden of establishing that one of the six standards listed in RCW 36.70C.130(1) has been met." *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). The six LUPA standards are as follows:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial

> when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

A court's review under LUPA is highly deferential to the local jurisdiction's decision. "RCW 36.70C.130(1) reflects a clear legislative intention that. . . court[s] give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation." *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004) (internal punctuation omitted).

4.2.3. Schnitzer bears the exclusive burden of persuasion on appeal.

"Once challenged, the party asserting subject matter jurisdiction bears the burden of proof on its existence." *Outsource Serv. Mgt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147 (2013). Accordingly, it is incumbent upon Schnitzer to demonstrate that LUPA jurisdiction applies under the circumstances of this case.

Likewise, for purposes of LUPA review, Schnitzer bears the exclusive burden of proving that one or more of the standards for relief under that statute have been satisfied. RCW 36.70C.130(1). Schnitzer's burden in this regard is unaffected by the Superior Court's ruling below.. *Id.;* Division II Court of Appeals General Order No. 2010-1, *In Re: Modified Procedures For Appeals Under The Administrative Procedures Act, Chapter 34.05, and Appeals Under the Land Use Petition Act, Chapter 36.70C RCW.*

4.3. The Court Lacks Subject Matter Jurisdiction Over Ordinance No. 3067.

By the plain terms of Chapter 36.70C RCW, the Court's jurisdiction under LUPA is strictly limited to reviewing a municipality's final determination on a project-specific development *application.* As a generally applicable, legislative amendment to the City of Puyallup's development regulations, Ordinance No. 3067 falls well beyond the Court's purview under Chapter 36.70C RCW and is instead subject to review by the GMHB. Schnitzer's Land Use Petition should accordingly be dismissed for lack of jurisdiction.

4.3.1 Ordinance No. 3067 is not a "land use decision" subject to review under LUPA.

The purpose of the Land Use Petition Act is to establish uniform, expedited appeal procedures and review criteria for judicial review of local land use decisions. *See* RCW 36.70C.010. To this end, Chapter 36.70C RCW is intended to serve as the "exclusive means of judicial review of land use decisions," subject to a few limited exceptions not relevant here. RCW 36.70C.030. Critical to LUPA's review framework is the Act's definition of "land use decision":

> "Land use decision" means a *final determination* by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, *on*:
>
> (a) An *application* for a *project permit* or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; *excluding applications for legislative approvals* such as area-wide rezones and annexations; and excluding applications for business licenses;
>
> . . . .

RCW 36.70C.020(2) (emphasis added).[3] For several reasons, Ordinance No. 3067 falls beyond the scope of this definition and is not a "land use decision" subject to LUPA jurisdiction.

4.3.1.1 Ordinance No. 3067 is not a final determination regarding a project-specific land use development application.

Most fundamentally, the challenged ordinance is not a "land use decision" subject to LUPA because it is not, and does not purport to be, the City of Puyallup's "final determination" on "an application for a project permit or other governmental approval" necessary in order to develop, use or transfer property. RCW 36.70C.020(2)(a).

It is undisputable that the enactment of Ordinance No. 3067 was self-initiated by the Puyallup City Council and did not stem from any "application" for a project permit or other site-specific approval request. *CP 205.* At the time the City Council commenced the legislative process for extending the SPO overlay to the recently annexed area, Schnitzer had not filed any applications nor sought any project permits. The ordinance likewise contains no reference whatsoever to any such "application,"

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[3] The definition of a "land use decision" under LUPA also includes certain property-specific "interpretative or declaratory" determinations and the "enforcement" of local land use ordinances. RCW 36.70C.020(2)(b)&(c). These provisions are irrelevant to the instant matter, as neither party contends that Ordinance No. 3067 constitutes an interpretative or declaratory decision or a regulatory enforcement determination.

much less any suggestion that the enactment was intended to serve as the City's "final determination" in this regard. *CP 205-11.* A "final determination" under LUPA is one that "reaches the merits and terminates the *permit process*." *Samuel's Furniture, Inc. v. State Dept. of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002) (emphasis added). As such, there can be no final determination—and thus, no reviewable "land use decision"—without a specific project permit application.

"Project permit" as used in RCW 36.70C.020(2) is likewise a legal term of art under Washington land use law, and is borrowed from the Regulatory Reform Act, RCW 36.70B. The term refers exclusively to *project-specific* land use approvals, as distinct from legislative enactments that establish generally applicable regulations:

> "Project permit". . . means any land use or environmental *permit or license* required from a local government for a *project action*, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, *site-specific rezones* authorized by a comprehensive plan or subarea plan, *but excluding the adoption or amendment of* a comprehensive plan, subarea plan, or *development regulations* except as otherwise specifically included in this subsection.

RCW 36.70B.020(4) (emphasis added).

Ordinance No. 3067 does not reference, much less enter a final determination regarding, any application for a building permit, subdivision, conditional use, or any other specific approval for a "project action" of this type. No reported Washington authority has ever recognized LUPA jurisdiction in this context without the requisite development "application" by a site-specific, project permit applicant. The absence of this factor removes the instant appeal from LUPA's ambit as a matter of law.

4.3.1.2 Ordinance No. 3067 is not a site-specific rezone.

Schnitzer's approach to addressing the statutory "application" criterion is to simply ignore it. *See* Brief of Respondent at 14-18. Instead, the centerpiece of Schnitzer's legal argument contends that Ordinance No. 3067 is a "site-specific rezone". Brief of Respondent at 15-18. For several reasons, this characterization, which was erroneously accepted by the Superior Court below, *see CP 677, 702*, fails as a matter of law and is unhelpful to Schnitzer.

"A site-specific rezone is a change in the zone designation of a specific tract at the request of specific parties." *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 50, 308 P.3d 745 (2013) (emphasis added) (citation and internal punctuation omitted); *see*

also Woods, 162 Wn.2d at 611 n.7. The SPO overlay expansion effectuated by Ordinance No. 3067 satisfies none of these three criteria.

First, the ordinance does not purport to alter the underlying zone designation of any property. *CP 205-11.* The SPO overlays created under Chapter 20.46 PMC, including the ML-SPO overlay enacted by Ordinance No. 3067, "establish[] standards to *supplement* base zoning standards in this area[.]" PMC 20.46.005 (emphasis added) *(CP 268).* The base zoning for property subject to the overlay designation under Chapter 20.46 PMC remains unchanged.

Second, the scope of Ordinance No. 3067 is not limited to "a specific tract". Washington land use law defines "tract" as synonymous with "lot" or "parcel". *See, e.g.,* RCW 58.17.020(9). By their terms, the text amendments adopted under Ordinance No. 3067 apply uniformly to the City's entire ML-SPO overlay district. The reach of these amendments currently affects a large (20+ acre) area containing multiple parcels, and the regulations adopted under the ordinance will apply to any other properties that may ultimately be added to the overlay area in the future. *CP 205-11.* A text amendment is of area-wide significance if it affects an entire zoning classification and "not just a specific tract." *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d

356, 365-66, 894 P.2d 1300 (1995) (citing *Raynes v. Leavenworth*, 118 Wn.2d 237, 258, 821 P.2d 1204 (1992) (emphasis added)). The scope of Ordinance No. 3067 clearly extends beyond a single tract and is not site-specific under this standard.

Finally, and most significantly, the amendments contained in Ordinance No. 3067 were self-initiated by the City and thus did not originate from the "request" of Schnitzer or any other "specific parties." *CP 205*. In this regard, the requisite "request" from a "specific party" simply reflects the definition of a land use decision under LUPA itself, which unequivocally requires an "application" from a particular applicant. *See* RCW 36.70C.020(2)(a). Certain types of site-specific rezones are indeed included by implication within the statutory definition of a "land use decision" under LUPA. *See* RCW 36.70C.020(2); RCW 36.70B.020(4). However, reclassifications of this type—like all other categories of local land use approvals governed by LUPA—constitute "land use decisions" under the statute only if they represent the municipality's "final determination" on a project-specific "application". *Id.* Ordinance No. 3067 did not result from the application of any party and thus cannot meet this criterion.

Tellingly, none of the authority cited by Schnitzer recognizes LUPA jurisdiction for a site-specific rezone that was self-initiated by a local legislative body. *See* Respondent's Opening Brief at 15-22. Each of these cases instead concerns a zoning map amendment that was specifically requested by a landowner or other project applicant, and thus—by definition—involved an "application" for the proposed reclassification. *See, e.g., Woods v. Kittitas County,* 162 Wn.2d 597, 604 174 P.3d 25 (2007); *Kittitas County v. Kittitas County Conservation Coalition,* 176 Wn. App. 38, 45, 308 P.3d 745 (2013); *Feil v. Eastern Washington Growth Mgt. Hrgs. Bd.*, 172 Wn.2d 367, 371-74, 259 P.3d 227 (2011). As Schnitzer implicitly concedes by its inability to produce any contrary authority, no reported Washington case recognizes LUPA jurisdiction in the absence of an application.[4]

4.3.1.3 Ordinance No. 3067 is a purely legislative enactment.

[4] Moreover, even assuming *arguendo* that Ordinance No. 3067 was in fact a site-specific rezone (it is not), only "site-specific rezones *authorized by a comprehensive plan*" are project permit-applications and thus subject to LUPA. *See* RCW 36.70C.020(2); RCW 36.70B.020(4) (emphasis added). Schnitzer's own Land Use Petition in this appeal emphatically alleges that Ordinance No. 3067 is inconsistent with, and thus not authorized by, the City of Puyallup's Comprehensive Plan. *See* CP 33. In a naked attempt to invoke the Court's jurisdiction under LUPA, Schnitzer now characterizes Ordinance No. 3067 as a "site-specific rezone authorized by the City's Comprehensive Plan". *See* Respondent's Opening Brief at 18-22. Schnitzer cannot credibly assert such contradictory positions in the same appeal.

The challenged measure is further removed from LUPA jurisdiction because of its wholly legislative character. Even if Ordinance No. 3067 had been enacted in response to the requisite "application" (it was not), RCW 36.70C.020(2)(a) categorically excludes from LUPA jurisdiction all "applications for legislative approvals". *See, e.g., Horan v. City of Federal Way*, 110 Wn. App. 204, 39 P.3d 366 (2002) (enactment of sign code ordinance not subject to LUPA); *Berst v. Snohomish County*, 114 Wn. App. 245, 253-54, 57 P.3d 273 (2002) (development moratorium not subject to LUPA). A city council acts in a legislative capacity when "adopting, amending or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance." RCW 42.36.010. A hallmark of legislative action is that it involves "the enactment of a new general law of prospective application." *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244-45, 821 P.2d 1204 (1992) (citation omitted).

Ordinance No. 3067 is unequivocally legislative under this standard, as it establishes a body of prospective, generally applicable land use regulations intended to govern future development within a designated area. *CP 205-11.* The ordinance is comprised almost entirely of text

revisions to the City's generally applicable zoning code, *see CP 207-09,* which are *per se* legislative in character. *See Raynes*, 118 Wn.2d at 248; *Citizens Alliance*, 126 Wn.2d at 365-66. The expansion of the City's SPO overlay to include additional areas, including the Van Lierop property, is likewise area-wide—and thus legislative—as a matter of law because the amendment affects more than one parcel and did not result from the request of a specific party. *See Kittitas County*, 176 Wn. App. at 50; *Wood*, 162 Wn.2d at 611 n.7.[5]

Contrary to Schnitzer's core premise in this appeal, the legislative character of an ordinance is not changed merely because the enactment presently "affects. . . a limited area and involves readily identifiable

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[5] Washington courts have developed a four-part test for determining whether a local action is legislative in character: (1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators. *Raynes*, 118 Wn.2d at 244-45 (citing *Standow v. City of Spokane*, 88 Wn.2d 624, 631, 564 P.2d 1145 (1976)).

Ordinance No. 3067 is clearly legislative under this test. Courts do not adopt local land use regulations of the type enacted under the ordinance, and have never historically performed this function. *Id.* at 245. The amendments contained in the ordinance likewise involved the policy-making role of the Puyallup City Council and did not purport to apply current law to specific factual circumstances. *Id.* Indeed, the City conducted a public hearing and carefully studied the issue from a policy standpoint before adopting the challenged amendments. *Id.* Finally, the judiciary's purview simply does not extend to the local policy-making process implicated by Ordinance No. 3067. *Id.*

individuals." *Raynes*, 118 Wn.2d at 241, 247-49 (zoning amendment was legislative even where only two parcels were potentially affected). LUPA jurisdiction simply does not extend to legislative measures of this type.

GMHB case law is in accord, categorically holding that "*any* action to amend. . . the text of a development regulation" and "[*a*]*ny* amendment to the official zoning map that is proposed and processed concurrently with. . . development regulation text amendments" are legislative actions subject to Growth Board jurisdiction. *Bridgeport Way Community Ass'n v. City of Lakewood*, CPSGMHB Case No. 04-3-0003, Final Decision & Order (July 14, 2004), at 8 (emphasis added). Section 5 of Ordinance No. 3067 contains an amendment to the City of Puyallup's official zoning map (expanding the scope of the SPO Overlay), while Sections 1-4 contain amendments to the development regulations codified at Chapter 20.46 PMC. *CP 205-11.* These map and text amendments were processed and adopted concurrently by the Puyallup City Council in the same enactment. *Id.* The challenged ordinance is accordingly legislative and as such is excluded from LUPA jurisdiction as a matter of law under RCW 36.70C.020(2)(a).

4.3.2 Ordinance No. 3067 contains development regulation amendments that are reviewable exclusively by the Growth Management Hearings Board.

Finally, LUPA does not apply to "[l]and use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as . . . the growth management hearings board." RCW 36.70C.030(1)(a)(ii); *Harrington v. Spokane County,* 128 Wn. App. 202, 213, 114 P.3d 1233 (2005). It is axiomatic that a local land use decision cannot be separately reviewable both under LUPA and by the Growth Management Hearings Board. *King County v. Central Puget Sound Growth Management Hearings Board,* 91 Wn. App. 1, 26-28, 951 P.2d 1151 (1998). Where a challenged action is subject to review by the GMHB, that measure is "outside the scope of a LUPA petition." *Id.*

Under the Growth Management Act (GMA), the GMHB has exclusive jurisdiction over challenges to local "development regulations". *See* RCW 36.70A.280(1)(a). "Development regulations" are defined in relevant part by the GMA as "the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances. . . . together with any amendments thereto." RCW 36.70A.030(7).

The amendments contained in Ordinance No. 3067 unquestionably constitute "development regulations" under this definition. The architectural design standards, setback requirements, use regulations, signage provisions and stormwater requirements imposed by the ordinance are, by their plain terms and effect, precisely the type of local "controls placed on development or land use activities" over which the GMHB has exclusive jurisdiction. *See* RCW 36.70A.030(7); RCW 36.70A.280(1)(a). LUPA jurisdiction does not lie under these circumstances.[6]

This conclusion is unaltered by the zoning map amendment effectuated by Ordinance No. 3067 which expands the scope of the City's SPO overlay district. Again, GMHB caselaw clarifies that where—as here—an amendment to a local zoning map is adopted concurrently with text amendments to the city's code, the entire enactment falls within the Growth Board's subject matter jurisdiction:

> The Board holds that any action to amend... the text of a development regulation is a legislative action subject to the goals and requirements of RCW 36.70A, including the subject matter jurisdiction provisions of RCW 36.70A.280. Any amendment to the official zoning map that is proposed and processed concurrently with... development regulation text amendments is necessarily a

[6] Schnitzer's pending appeal of Ordinance No. 3067 to the GMHB should be construed as an effective concession on this point.

> legislative action subject to the goals and requirements of the GMA.

Bridgeport Way Community Ass'n v. City of Lakewood, CPSGMHB Case No. 04-3-0003, Final Decision & Order (July 14, 2004), at 8. No reported judicial or GMHB caselaw has ever overturned or otherwise qualified this jurisdictional rule.

As the administrative tribunal charged with construing and implementing the Growth Management Act, the GMHB's interpretations of the GMA planning framework are afforded "substantial weight" by Washington courts. *See, e.g., Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 154, 256 P.3d 1193 (2011); *Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006). *Bridgeport* clarifies beyond question that the legislatively enacted zoning map and text amendments contained in Ordinance No. 3067 fall squarely within the subject matter jurisdiction of the GMHB and are not judicially reviewable under LUPA.

4.3.3 LUPA's strictly limited jurisdiction cannot be judicially expanded.

"Subject matter jurisdiction governs the court's authority to hear a particular type of controversy." *Pacific Marine Ins. Co. v. Dept. of Revenue*, 181 Wn. App. 730, 738, 329 P.3d 101 (2014) (citation omitted).

Jurisdiction "is a prerequisite to the exercise of judicial power[.]" *Matheson v. City of Hoquiam*, 170 Wn. App. 811, 818, 287 P.3d 619 (2012). A party may raise a lack of subject matter jurisdiction at any time during a proceeding, including on appeal. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County,* 135 Wn.2d 542, 556, 958 P.2d 962 (1998). A judgment entered by a trial court lacking subject matter jurisdiction is void. *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075 (2012). "When a court lacks subject matter jurisdiction, the only permissible action it may take is to dismiss the action." *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Comm'n,* 151 Wn. App. 788, 801, 214 P.3d 938 (2009).

This mandate applies with particular force in Land Use Petition Act cases, where the Court's review authority is strictly construed. LUPA contains clear statutory requirements that *must* be met before a reviewing court's subject matter jurisdiction is invoked. *Citizens to Preserve Pioneer Park LLC* v. *City of Mercer Island,* 106 Wn. App. 461, 467, 24 P.3d 1079 (2001). The statutory language of LUPA is explicit and unambiguous. *Overhulse Neighborhood Ass'n v. Thurston County,* 94 Wn. App. 593, 597, 972 P.2d 470 (1999). Courts must construe LUPA jurisdiction narrowly and strictly, and are not empowered to expand it:

> A superior court may not expand its statutory authority by varying LUPA's definition of a land use decision. Nor may the superior court expand its authority in a LUPA action by reviewing that which the legislature, in enacting LUPA, did not allocate to the court the authority to review.

Durland v. San Juan County, 175 Wn. App. 316, 324, 305 P.3d 246 (2013) (citation and internal punctuation omitted) (emphasis added), *aff'd*, 182 Wn.2d 55, 340 P.3d 191 (2014).

Here, the language, effect and surrounding context of Ordinance No. 3067 all demonstrate that the enactment falls far outside of LUPA's strictly limited jurisdiction. Nothing in the ordinance purports to grant or otherwise render a determination on any "permit" or "license" for a "project action" of the kind listed in RCW 36.70B.020(4). Instead, by their plain terms the code amendments enacted by the ordinance form a body of prospective land use regulations that will govern all *unspecified,* non-vested future development within the ML-SPO overlay area. *CP 205-11.* No permit, license or other project action whatsoever is cited in the ordinance.

All relevant authority uniformly supports the characterization of Ordinance No. 3067 as a City-initiated, legislatively enacted amendment that is exclusively subject to GMHB review. By contrast, Schnitzer disregards the plain language of RCW 36.70C.020 in violation of the most

basic principles of statutory construction. *See, e.g., Ralph v. Dept. of Natural Resources*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (courts cannot ignore express statutory terms and must interpret statutes to give effect to all words). The company likewise fails to offer any authority under which a similar enactment has ever been construed as a "land use decision" subject to judicial jurisdiction under LUPA.

Schnitzer instead focuses upon the fact that the ML-SPO regulations enacted under Ordinance No. 3067 currently apply only to a few parcels, and alleges that the enactment of these regulations deliberately "targeted" Schnitzer's future development plans for the area. Respondent's Opening Brief, at 22. Like the Superior Court below, Schnitzer relies upon these assertions to support its novel rezone-by-implication theory, contending that Ordinance No. 3067 was actually a site-specific, quasi-judicial rezone adopted "under the guise of legislative action." *CP 677;* Respondent's Opening Brief at 22.

Washington courts have consistently rejected similar arguments, refusing to "imply that a text amendment is the functional equivalent of a rezone." *Citizens Alliance*, 126 Wn.2d at 365-66. Contrary to Schnitzer's core premise, "that the ordinance affects specific individuals is not a reason to classify the proceedings as quasi-judicial." *Raynes*, 118 Wn.2d

at 248. The fact that a particular code amendment "has a high impact on a few people does not alter the fundamental nature of the decision" as legislative. *Id.* at 249.[7] Courts likewise refuse to speculate regarding the personal motives of council members in enacting local legislation, dismissing such concerns as irrelevant to judicial review. *See, e.g., Hasit LLC v. City of Edgewood (Local Improvement No. 1),* 179 Wn. App. 917, 951, 320 P.3d 163 (2014) (citation omitted); *Adult Entertainment Center, Inc. v. Pierce County*, 57 Wn. App. 435, 441, 788 P.2d 1102 (1990).

Schnitzer's attempts to mischaracterize Ordinance No. 3067 as a land use decision are without merit. The Court lacks subject matter jurisdiction over the ordinance and should dismiss the instant appeal on that basis.

4.3.4 The City Followed Applicable Procedures in Enacting Ordinance No. 3067.

Schnitzer contends that the City utilized an improper process in considering and adopting Ordinance No. 3067. *See* Respondent's Opening Brief at 25-29. Under Schnitzer's theory, the proposal should

[7] Schnitzer's attempt to distinguish *Raynes* is unpersuasive. Respondent's Opening Brief at 17-18. The legal standard for legislative actions enunciated there is clear on its face and is not limited to the facts of that case. *Raynes*, 118 Wn.2d at 343-50. Contrary to Schnitzer's assertion, Ordinance No. 3067 was by its plain terms adopted in order to "address a policy issue facing the City"—i.e., the appropriate regulatory standards for development within a large, significant, multi-parcel area that had recently been annexed into Puyallup. *CP 205-06.*

have been subjected to a public hearing before the City's Hearing Examiner rather than the Puyallup Planning Commission. *Id.* Schnitzer is incorrect.

4.3.4.1 The amendments contained in Ordinance No. 3067 were properly considered by the City's Planning Commission.

Ordinance No. 3067 is comprised overwhelmingly of amendments to the text of the City's development regulations. *CP 207-09.* The City's Planning Commission is exclusively responsible for holding a public hearing and making a recommendation to the City Council on measures of this type. *See* PMC 20.10.020(1). The Council holds the final authority to accept or reject any such recommendation. *See* PMC 20.10.035(1). Separately, the City has established a procedure under which other parties may submit an application requesting development code amendments. *See* Chapter 20.91 PMC. However, the respective roles of the Planning Commission and the City Council are unchanged with respect to this process. *Id.*

The City of Puyallup correctly followed these prescribed procedures in considering and adopting Ordinance No. 3067. Following annexation of the Van Lierop property in 2012, the Council self-initiated the legislative process by identifying the potential need for amendments to

Chapter 20.46 PMC and directing the City's Planning Commission to study the issue. *CP 112-13; CP 205.* The Planning Commission reviewed the proposal, conducted a duly-noticed public hearing to solicit and receive testimony and written submittals from all interested parties, and ultimately forwarded a policy recommendation to the City Council. *CP 140-54.* The City Council subsequently enacted Ordinance No. 3067. *CP 205-11.* The Council's adoption of the measure was supported by numerous citations to the City's Comprehensive Plan and findings addressing the City's local criteria for amendments of this type. *CP 205-06.* The process followed by the City in this regard was facially compliant with applicable PMC provisions.

Schnitzer's contention that Ordinance No. 3067 should have been reviewed by the City's Hearing Examiner is without merit. No provision of the Puyallup Municipal Code remotely authorizes the Hearing Examiner to review code amendments of the type contained in Ordinance No. 3067. While the Hearing Examiner is responsible for conducting hearings on "*rezone applications*", *see* PMC 20.10.015(6), PMC 2.54.070(5) (emphasis added), no such "application" exists in the instant

case.[8] The Hearing Examiner's own procedural regulations clarify that an "'[a]pplicant' means those applying to the city of Puyallup for approval of land uses that conform to the city's goals, policies, plans and programs of development." PMC 2.54.020(1) (emphasis added). By the plain terms of this limitation, the Examiner's jurisdiction extends only to applications that are made *to* the City of Puyallup; it does not include proposals that are initiated *by* the City. *Id.* More fundamentally, the City's procedural regulations nowhere purport to involve the Hearing Examiner in legislative policy-making functions, which in turn are reserved to the Planning Commission (which makes a recommendation) and the City Council (which makes a final policy determination). Indeed, the City's primary purpose in creating the office of the Hearing Examiner in the first instance was to "[s]eparate the land use regulatory function from the land use planning process[.]" PMC 2.54.010(1); *cf.* RCW 36.70B.030(2)&(3).

Finally, even if the new ML-SPO overlay established by Ordinance No. 3067 could be fairly characterized as "the creation of a new zone" (again, the base zoning designation of all affected property remains unchanged by the overlay), the City's procedural regulations clearly

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[8] Again, Schnitzer's fundamental premise that Ordinance No. 3067 is a rezone in the first instance is erroneous, as the base ML zoning for the affected property is unaltered by the ordinance.

delegate the review and recommendation function for such measures to the Planning Commission—*not* the Hearing Examiner. *See* PMC 20.10.020(1). The City's procedure in reviewing and enacting Ordinance No. 3067 was correct.

4.3.1.2 Even if the City had followed an incorrect process in adopting Ordinance No. 3067, the error was harmless.

"Even when there are procedural errors in the decision-making process, a land use decision may not be reversed under LUPA if the court determines the errors were harmless." *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 54, 52 P.3d 522 (2002); RCW 36.70C.130(1)(a). "Harmless error is one that is not prejudicial to the substantial rights of the party assigning errors and does not affect the outcome of the case." *Young v. Pierce County,* 120 Wn. App. 175, 188, 84 P.3d 927 (2004) (citation and internal punctuation omitted). Critically, a procedural error is harmless where the substantive result reached by the local jurisdiction would have been the same irrespective of the alleged mistake. *See, e.g., Jones v. Town of Hunt's Point*, 166 Wn. App. 452, 462-63, 272 P.3d 853 (2011).

Schnitzer's procedural argument collapses under this standard. As explained *supra*, the City's process in adopting Ordinance No. 3067

complied with applicable PMC procedures. But, for the following reasons, even if the ordinance involved a "rezone application" that should have been vetted by the Hearing Examiner rather than the Planning Commission (it was not), this alleged "error" was clearly harmless under the relevant circumstances.

First, both the Hearing Examiner and Planning Commission serve in a purely advisory capacity in this context, holding a hearing on the subject proposal and making a recommendation to the City Council. *See* Chapter 20.90 PMC; Chapter 20.91 PMC. Thus, irrespective of whether the amendments contained in Ordinance No. 3067 are characterized as text changes or a rezone, the Council retains ultimate decisional authority with respect to both categories of amendments. *Id.*[9] As it relates to the SPO overlay amendments effectuated by Ordinance No. 3067, the City Council's desired outcome could hardly be clearer: The Council self-initiated the legislative process for these amendments; it specifically directed the Planning Commission to evaluate the proposal; it voted to adopt the ordinance over the Planning Commission's contrary recommendation; and it ultimately supported its enactment of Ordinance

[9] The City of Puyallup's decisional framework reflects a basic principle of Washington law that only a city's legislative body may adopt ordinances, amend its development regulations and change its official zoning map; these functions are non-delegable. *See, e.g.*, RCW 35A.11.020; RCW 36.70A.130.

No. 3067 with numerous findings. *CP 205-06.* Clearly the recommendation of the advisory body, much less its identity, did not affect the City Council's policy decision or otherwise alter the substantive result in this proceeding. Reversible error is not found under such circumstances. *See, e.g., Jones*, 166 Wn. App., at 462-63.

Second, Schnitzer cannot demonstrate any resulting prejudice from the City's legislative procedures. The Planning Commission not only held a duly-noticed public hearing to accept testimony and evidence in support of and opposition to the proposed amendments, it also conducted two separate study sessions on the proposal in advance of the hearing. *CP 115-55, CP 205-06.* The record demonstrates that the owner of the Van Lierop property was specifically notified of the proceedings and in fact attended them. *CP 133-34, 152.* The Planning Commission specifically considered the relevant PMC standards for text amendments and zoning map amendments. *CP 148-49.* The Puyallup City Council ultimately concluded that these criteria had been satisfied. *CP 205-06.* Schnitzer and all other interested parties clearly enjoyed an opportunity to present oral testimony and submit written evidence on these determinations before the Planning Commission in effectively the same manner as they would have

before the Hearing Examiner. Schnitzer cannot demonstrate prejudice under these circumstances.

4.4. Ordinance No. 3067 Is Not a Spot Zone.

Schnitzer's only substantive challenge to Ordinance No. 3067 contends that the enactment constitutes a "discriminatory spot zone". Respondent's Opening Brief at 29-31. Under the relevant facts and applicable law, the City's adoption of the challenged ordinance cannot in any way be characterized in this manner. "Spot zoning is zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land and is not in accordance with the comprehensive plan." *Willipa Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp.*, 115 Wn. App. 417, 432, 62 P.3d 912 (2003) (citation and internal punctuation omitted). "Only where the spot zone grants a discriminatory benefit to one or a group of owners to the detriment of their neighbors or the community at large without adequate public advantage or justification will the. . . rezone be overturned." *Id.* (citation omitted). Ordinance No. 3067 meets none of these criteria and is not a spot zone.

4.4.1. Ordinance No. 3067 is consistent with the City's Comprehensive Plan.

A local zoning action does not constitute "spot zoning" unless the action is inconsistent with the municipality's comprehensive plan. *Id. See also Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 875, 947 P.2d 1208 (1997); *SORE v. Snohomish County,* 99 Wn.2d 363, 368, 662 P.2d 816 (1983); *Henderson v. Kittitas County*, 124 Wn. App. 747, 758, 100 P.3d 842 (2004). Here, Schnitzer has already conceded the consistency of the ordinance with the City of Puyallup's Comprehensive Plan. *See* Respondent's Opening Brief at 18, 22. Moreover, as noted *supra*, the Puyallup City Council supported its adoption of Ordinance No. 3067 with numerous citations to applicable Comprehensive Plan policies, none of which are meaningfully challenged by Schnitzer. *CP 205-06.* The undisputed record before the Court establishes that the ordinance is consistent with the City's Comprehensive Plan.

4.4.2 Ordinance No. 3067 does not change the use classification of any property.

The challenged ordinance amends the text of the City's development code and expands the scope of a previously established overlay district. *CP 205-11.* It does not change the base zoning of the affected property, which remains in its original ML designation. *Id.* As such, the ordinance does not "specially zone" the area for any particular "use classification"—much less a classification that is different from or

inconsistent with the surrounding property. *Willipa Grays Harbor*, 115 Wn. App. at 432. Indeed, parcels located closely nearby the Van Lierop property are already included within the SPO overlay, and the City's longstanding policy intent—as formally expressed in Chapter 20.46 PMC—was always to extend the overlay to the Van Lierop property after it had been annexed. *CP 207.* No reported Washington case law has ever characterized a local action as spot zoning without a reclassification of the subject property's base zoning.

4.4.3. Ordinance No. 3067 does not confer a discriminatory benefit.

Finally, as a matter of law, spot zoning does not exist unless the challenged action "grants a discriminatory *benefit*" to the affected landowner while disadvantaging neighboring owners. *Willipa Grays Harbor*, 115 Wn. App. at 432 (emphasis added). Schnitzer does not—and cannot—demonstrate how any neighboring landowners would be disadvantaged by the additional regulations established by Ordinance No. 3067. Respondent's Opening Brief at 29-31. Schnitzer has likewise effectively conceded the "discriminatory benefit" criterion, as the fundamental premise of its appeal asserts precisely the opposite position—i.e., that the regulations established by Ordinance No. 3067 allegedly

impose a severe *detriment* to owners of the affected property. *See* Respondent's Opening Brief at 10-11.

Borrowing from the Superior Court's reasoning below, Schnitzer's argument essentially attempts to rewrite the Washington judiciary's longstanding expression of the spot zoning doctrine:

> I cannot find case law which directly limits application of the spot-zoning line of cases solely to those situations in which the alleged spot zone favors the landowner.

Respondent's Opening Brief at 30; *CP 679.* This conclusion is inexplicable, as virtually every reported spot zoning case expressly limits the application of the doctrine in precisely this manner. *See, e.g., SANE v. City of Seattle*, 101 Wn.2d 280, 286, 676 P.2d 1006 (1984); *Willipa Grays Harbor*, 115 Wn. App. at 432; *Henderson,* 124 Wn. App. at 758; *Bassani*, 70 Wn. App. at 396. Schnitzer can cite no authority under which a Washington court has found spot zoning under such circumstances, and its spot zoning argument is without merit.

4.5. The Appearance of Fairness Doctrine Is Inapplicable to the City Council's Adoption of Ordinance No. 3067.

Schnitzer's contention that the Puyallup City Council's enactment of Ordinance No. 3067 violated the Appearance of Fairness Doctrine also fails. The doctrine by its terms applies only to quasi-judicial actions and

as a matter of law is categorically inapplicable to legislatively enacted measures like Ordinance No. 3067:

> Quasi-judicial actions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

RCW 42.36.010. State law further clarifies that "[n]o legislative action taken by a local legislative body, its members, or local executive officials shall be invalidated by an application of the appearance of fairness doctrine." RCW 42.36.030.

Ordinance No. 3067 contains amendments to the text of the City's development regulations and a City-initiated zoning map amendment affecting multiple parcels. *CP 205-11*. As explained *supra*, the enactment is accordingly legislative—not quasi-judicial—in nature, and as such falls beyond the scope of the Appearance of Fairness Doctrine. That the amendment presently only "affects. . . a limited area and involves readily identifiable individuals" does not alter this conclusion or otherwise transform the measure into a quasi-judicial action. *Raynes*, 118 Wn.2d at 247-49. No reported Washington opinion has ever applied the

Appearance of Fairness Doctrine to the type of local enactment at issue here, and Schnitzer cites no authority to this effect. The doctrine has no application in this context.[10]

V. CONCLUSION

Ordinance No. 3067 was not the City of Puyallup's final determination on a project permit application, and thus does not constitute a "land use decision" under Chapter 36.70C RCW as a matter of law. The Court's strictly limited subject matter jurisdiction under LUPA does not extend to council-initiated legislative measures like the development code amendments contained in Ordinance No. 3067. The exclusive venue for challenging local enactments of this type is the Growth Management Hearings Board—where Schnitzer's concurrent appeal of Ordinance No. 3067 is presently pending. The Superior Court erred by refusing to dismiss Schnitzer's Land Use Petition for lack of jurisdiction.

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[10] Separate from the inapplicability of the Appearance of Fairness doctrine to the facts at bar, the evidence of alleged bias cited by Schnitzer is also insufficient on its face to demonstrate any violation of the doctrine. Respondent's Opening Brief at 34. All of this evidence concerns statements made by individual Puyallup City Council Members during its deliberations on a separate development moratorium that was legislatively adopted by the City in January 2014—an enactment that is not challenged in this appeal. "Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172 (1992); *Swoboda v. Town of La Conner*, 97 Wn. App. 613, 628-29, 987 P.2d 103 (1999). Schnitzer cites no Washington authority remotely suggesting that comments made during a separate legislative process can be used to challenge the measure (Ordinance No. 3067) at issue in the instant proceeding. No such authority exists.

Separate from the dispositive jurisdictional issue, Schnitzer's challenges to Ordinance No. 3067 are unavailing. The Appearance of Fairness Doctrine is categorically inapplicable to the legislative code amendments adopted under the ordinance, and the measure meets none of the well-established standards for spot-zoning under Washington law. The City likewise followed all applicable procedures in its consideration and adoption of Ordinance No. 3067. By Schnitzer's own admission, the ordinance is authorized by the City's Comprehensive Plan, and no provision of Washington law prevents municipalities from amending the local standards that will govern development within a particular area. Schnitzer's subjective disagreement with the land use policies effectuated under the enactment is an insufficient basis for legal challenge.

The Court of Appeals should reject Schnitzer's arguments, reverse the Superior Court's decision below, and dismiss Schnitzer's LUPA appeal.

RESPECTFULLY SUBMITTED this 6th day of January, 2016.

OGDEN MURPHY WALLACE, P.L.L.C.

By 

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CERTIFICATE OF SERVICE

I certify that on the date below, I filed this document with the Court of Appeals, Division II, and provided copies of the foregoing upon the following counsel:

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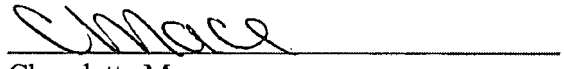

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